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No. 787

In the

Supreme Court of the United States

October Term, 1962

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, INC.
AND
JOHN W. BRUMMETT
AND
FARM BUREAU COOPERATIVE ASSOC., INC.,
Petitioners,

vs.

AMERICAN FIDELITY & CASUALTY CO., INC.,
Respondent.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondent prays that this petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit be denied.

OPINIONS BELOW

The conclusions of law by the United States District Court are reported at 195 F. Supp. 648, (printed Appendix E, *infra*). The subsequent order of the District Court denying petitioners' motion for relief pursuant to Rule

60 (B) is printed in Appendix F, *infra*. The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 308 F. 2d 697 (printed Appendix A).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

(I) Is there a conflict of authority between the several United States Courts of Appeals as to the Ohio law applicable to the issue determined below?

(II) Should there be a review of the decision of the United States Court of Appeals sustaining the decision of the United States District Court in its determination of the law of Ohio applicable to the issue below?

(III) Need there be a review of the decision of the United States Court of Appeals sustaining the decision of the United States District Court in applying the 'conformity doctrine'?

COUNTER-STATEMENT OF THE CASE

Absent the argumentative manner in which it is phrased, with exceptions as noted hereafter, respondent basically accepts the material facts stated by petitioner.

We advisedly refer to petitioner in the singular as the only petitioner with a real interest herein is Indemnity Insurance Company of North America as it fully insured Farm Bureau Cooperative Association, Inc. and John W. Brummett. Farm Bureau and Brummett are, and have been, mere nominal parties subservient to the interests of Indemnity, whose repeated demands and threats of litigation precipitated the bringing of this action for declaratory judgment by respondent.

There has never been any contention that Farm Bureau and Brummett did not come within the definition of an

insured as defined by the omnibus clause of respondent's policy. The essence of this case from its inception has been that the subject exclusionary clauses of respondent's policy exclude coverages to an insured (Farm Bureau and Brummett) in the event of injury to any employee (Candler) of the insured (Stillpass Transit Co.). The United States District Court and the United States Court of Appeals below have unanimously held the subject clauses so stating to be applicable, clear and unambiguous.

REASONS FOR DENYING WRIT

I.

There is no conflict of authority between several United States Courts of Appeals as to the Ohio law applicable to the issue determined below.

The exact issues determined below, involving the clauses of a national standard automobile liability policy with *retrospective provisions*, have been determined by only one other case, state or federal, — *American Fidelity & Casualty Ins. Co.* v. *St. Paul-Mercury Ind., Co.*, 248 F. 2d 509. In that case the United States Court of Appeals for the Fifth Circuit, construing the law of Alabama in absence of any definitive Alabama law, emphatically arrived at the same conclusion as that of the Courts below in this case.

The decisions herein are the only reported decisions of a United States Circuit Court of Appeals (or District Court) construing the law of Ohio as to the merits below.

Ginder v. *Harleysville Mutual Cas. Co.*, 135 F. 2d 215 (CA 3rd), construes the law of Pennsylvania, and *Kaifer* v. *Georgia Cas. Co.*, 67 F. 2d 309 (CA 9th), pertains to the law of California. Neither of these cases cited by petitioner are in any way involved in interpretation or decision

as to the law of Ohio and each construes somewhat similar, but materially different, insurance policies. Neither makes reference to the retrospective provisions as in respondent's policy.

The Ohio cases cited are obviously not applicable to this question and will be the subject of discussion under the third reason for denying writ (infra).

In *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 206, this Court has held that conflict among the Circuit Courts, as to questions controlled by state law; is not of itself reason for granting a writ of certiorari, as it "may be merely corollary to a permissible difference of opinion in the State Courts." That circumstance prevails here, as in the other cases cited by petitioner.

There is obviously no conflict shown between decisions or holdings of the several United States Courts of Appeals in construction or interpretation of the law of Ohio, or any other state, applicable to the issues determined below.

II.

The United States Court of Appeals did not err in sustaining the decision of the United States District Court in its determination of the law of Ohio applicable to the issue below.

Petitioner has attempted to precipitate an argument on the merits complete with the identical inapplicable examples presented on the merits in the Courts below. We also here defer discussion of the several decisions of the Common Pleas Courts of Ohio to the argument under the third reason for denying writ (infra).

No contest is made that the Ohio law, as set forth in *Home Ind. Co.* v. *Plymouth*, 146 O.S. 96, is that an exclusion in an insurance contract must be clearly set forth to be operative. Such has been found on the merits of

the issues herein by the Courts below, such having been specifically considered and in each instance the Courts have held the provisions of respondent's policy to be clear and unambiguous with the result that they must be afforded their obvious meaning.

Petitioner cites *Equitable Life Ins. Co.* v. *Gerwick*, 50 O.A. 266, 281, to the effect that conflicting conclusions of courts of numerous jurisdictions as to contract provisions portray ambiguity. The reported case shows that there was in fact no issue before that court of conflicting decisions of numerous jurisdictions. Only the law of Ohio is considered. Such statement was at best a corollary remark, a general expression not pertinent to the issue. The United States Supreme Court has held, in *Cohens* v. *Virginia*, 6 Wheat. 264, 399, 5 Sup. Ct. Law Ed. 264, as early as 1821, that general expressions in an opinion are to be respected but if they go beyond the case, "ought not to control the judgment in a subsequent suit, when the very point is presented for decision."

The only other case found (*American Fid. & Cas. Co., Inc.*, v. *St. Paul-Mercury Ind. Co.*, 248 F. 2d 509), officially reported or not, construing the same *retrospective* automobile liability insurance policy as that in issue here, reached the identical conclusion with that of the Courts below. There have been no conflicting decisions by courts of numerous jurisdictions on the particular issues herein.

III.

The United States Court of Appeals and the United States District Court applied the 'conformity doctrine' in finding the substantive law of Ohio pertaining to this cause as required by WEST v. A. T. & T. CO., 311 U.S. 223.

Is it probable, or possible, that the United States Court of Appeals and the United States District Court have

deliberately ignored determinative law of Ohio on the issues herein in repeated consideration of the identical argument and assertions of petitioner? The answer is "no".

Nothing is suggested or asserted by petitioner here that was not given full consideration by both Courts below.

In such as can be gleaned from the opinions in the three Ohio cases cited in the petition (p. 6, 10, 11), there is no consideration given to the interpretation of a national standard automobile liability policy with *retrospective* provisions. As applicable to consideration of the intent of the contracting parties, this retrospective provision is most material. Its import is to throw back upon its principal insured, Stillpass Transit, any loss that might be incurred or paid on behalf of any insured to Candler, the employee of Stillpass Transit. At the same time, Stillpass Transit, under the Workmens Compensation Statutes of Ohio, bears the additional burden of increased payments to the Ohio Workmens Compensation Fund occasioned by payments from that Fund for Candler's heavy medical expense and disability.

The decision of the Common Pleas Court of Franklin County, Ohio, *Travelers Ins. Co.* v. *Buckeye Union Cas. Co.* (unofficially reported at 81 Ohio L. Abs. 108), to the extent that it construed even somewhat similar provisions of insurance policies, was, at best, dicta relating to a moot question. Prior to reaching any question of the "employee exclusion", that Court first had to determine issues involving "loading – unloading", and in so doing determined the matter. The "employee exclusions" were never considered or mentioned on appeal as shown by the officially reported decision of the Franklin County Court of Appeals, 112 O.App. 386.

The Court of Common Pleas of Columbiana County, Ohio, in *Employers Liability Ins. Co.* v. *Liberty Mutual Ins. Co.* (unofficially reported at 167 N.E. 2d 142) remained

the decision only of that Common Pleas Court, to the extent that it indicates a similarity to the issues in this cause. The content and reasoning of that decision leaves much to be desired. There was no Appellate consideration or decision.

The issues in *American Automobile Ins. Co.* v. *Motorists Mutual Ins. Co.* (not reported, App. D), is even farther afield. The circumstances under which that litigation arose are completely different (App. D, p. 25-26). The decision illustrates that the Court is considering a "garage liability" policy, of which there are many and varied types. No transcript or record is provided. The insurance policies in question are not set out and it is not clear as to whether all of the stipulations and other evidence before the Common Pleas Court is shown. It is apparent from that decision (App. D, p. 28-32) that the Motorists Mutual Ins. Co. policy is of a different nature, with different coverages, different insuring agreements, different exclusions and a substantially different "definition of insured" amended by endorsement and only partially shown. There is no way of ascertaining what other issues, elements of these policies or facts may have been pertinent and influenced the Common Pleas Court in arriving at its decision — or the application of such decision to the issues here.

As appears in the petition (p. 6), that case was taken to the Cuyahoga County Court of Appeals, which affirmed the judgment without reference to the opinion of the lower Court and without opinion of that Appellate Court (not even a dissenting opinion such as was present and considered by Judge Potter Stewart in *Gettins* v. *United States Life Ins. Co.*, 221 F. 2d 782).

The pertinency of each of these cited Ohio Common Pleas decisions, as applicable hereto, was considered in detail, complete with the identical argument outlined in plaintiff's petition, by the United States District Court as

shown in its decision (App. F, p. 15, *infra*), and held inapplicable. The same subject and argument was given full consideration in the United States Court of Appeals, 308 F. 2d 697 (App. B, p. 21) and again held inapplicable.

At the conclusion of its opinion, The United States Court of Appeals stated, "Under the circumstances we do not believe that the case is a rule of decision by an Ohio Court 'commonly accepted and acted upon by the bar and inferior courts' within the meaning of *West* v. *A. T. & T. Co., supra,* 311 U.S. 223, p. 236" (App. B, p. 22).

The situation is not then as described by petitioner. There are no Ohio cases directly on the issues. Three Ohio Common Pleas Courts have construed somewhat similar, but materially different, insurance policies. There was no affirmance of the opinions, or reasons underlying them, by any appellate court in either of the three cases mentioned. Both the United States District Court and the United States Court of Appeals, after fully considering those cases and all other matters submitted, concluded that the Appellate Courts of Ohio would pronounce the law of Ohio on the particular issues in this matter as was emphatically done below.

This is the obligation of the Federal Courts under the doctrine arising from *Erie R. Co.* v. *Tompkins,* 304 U.S. 64. The circumstances here are very nearly identical to the ultimate question determined in *King* v. *Order of Travelers,* 333 U.S. 153, which affirms the decision of the United States Court of Appeals for the Fourth Circuit in rejecting the decision of the Common Pleas Court of South Carolina as determinative precedent of the law of that State. The similarity shown between the complex of the Courts in South Carolina and in Ohio is remarkable. The Common Pleas Courts of both states are Courts of record. South Carolina has 46 Common Pleas Courts (Ohio has 88), with 14 Common Pleas Judges (Ohio has approximately 160).

Despite being denominated Courts of record, the decisions of the Common Pleas Courts of both States are not in any way officially reported or digested. The decision of one Judge of a Common Pleas Court in Ohio is not necessarily considered as precedent by another Judge of the same Common Pleas Court in the same county, with the result that it is impossible to ascertain precedent from such decisions.

In the *King* decision, *supra*, (p. 161) it is stated that a Federal Court, in adjudicating a matter of State law, is in effect only another Court of that State and, "It would be incongruous to hold the Federal Court bound by a decision which would not be binding on any State Court".

This principle is exemplified by cases cited by petitioner (p. 14) where in *Brown* v. *Moore*, 247 F. 2d 711, the Federal Court found that the Common Pleas Court of Pennsylvania had pronounced the same rule of law as would the Supreme Court of Pennsylvania. In *California* v. *Renauld & Co*, 179 F. 2d 605, while adhering to the 'conformity doctrine', the Federal Courts found lower State Court rulings not binding.

In this instance we suggest that the questions involved have been well considered in all aspects, and properly determined by the Courts below, resulting in no necessity for review by this United States Supreme Court.

CONCLUSION

Respondent submits that petitioner fails, in all aspects presented, to justify review of this cause.

There is no conflict between the several United States Courts of Appeals in determining subject Ohio law. The matters decided below pertain to the contractual rights of the several parties with no error demonstrated. The Courts below have fully considered and determined the law of

Ohio in accord with all principles and doctrines pronounced by this United States Supreme Court.

Certainly the question involved is of substance and importance to the parties, but not to others to the extent that this Court is in any way obligated to review.

Respondent therefore has prayed that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX E

CONCLUSIONS OF LAW AND ORDER, OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties in this cause.

2. This Court has jurisdiction of the subject matter of this cause. Title 28 U.S.C.A. §§ 1332 and 2201.

3. Since federal jurisdiction in this case is founded on diversity of citizenship, this Court must follow the law of Ohio in deciding this case. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

4. There can be no doubt that the highest state court is the final authority on state law, Erie Railroad Co. v. Tompkins, supra, and where there is no decision of the highest state court, federal courts are bound by decisions of the state's intermediate appellate courts unless there is persuasive evidence that the highest state court would rule otherwise King v. Order of United Commercial Travelers of America, 333 U.S. 153 (1948); Six Companies of California v. Joint Highway District, 311 U.S. 180 (1940); West v. American Telephone and Telegraph Co., 311 U.S. 223 (1940); Stoner v. New York Life Insurance Co., 311 U.S. 464 (1940). The Supreme Court of the United States has also held that a federal court is bound by the decisions of a court of original jurisdiction where that court has state-wide jurisdiction and its standing on the equity side is comparable to that of an intermediate appellate court on the law side. Fidelity Union Trust Co.

v. Field, 311 U.S. 169 (1940). However, a federal court is not bound to follow state trial court decisions where those decisions are binding only upon the parties who are before the court in that particular case and would not constitute a precedent in any other case in that court or in any other court in the state. King v. Order of United Commercial Travelers of America, supra.

5. There are no decisions of the Ohio Supreme Court or of an Ohio Appellate Court on the question of law in this case and since the Courts of Common Pleas of Ohio do not have state wide jurisdiction and are similar to the state trial courts involved in King v. Order of United Commercial Travelers of America, supra, this Court is not bound by the decisions of the Common Pleas Courts of Ohio and may proceed to determine what the Supreme Court of Ohio would probably rule in a similar case. Of course, though not bound by the Common Pleas Courts of Ohio, this Court will attribute some weight to their decisions.

6. The Court has carefully considered the cases of Travelers Insurance Co. v. Buckeye Union Casualty Co., 81 O.L.A. 108 (Common Pleas Court, Franklin County 1959) and Employers Liability Assurance Corp. v. Liberty Mutual Insurance Co., unreported, (Columbiana County Common Pleas Court, Case No. 44982 1949). The first of these cases appears to be in conflict with two Sixth Circuit cases, cited infra at Number 8, on the question of whether there is any ambiguity in the language of the exclusion clause; therefore, that case will not be followed by this Court. As to the second case, the terms and the provisions of the liability insurance policy are not before this Court and therefore the copy of that court's journal entry submitted by counsel is not instructive.

7. Under Ohio law: "Where exceptions, qualifications or exemptions are introduced into an insurance contract, a

general presumption arises to the effect that that which is not clearly excluded from the operation of such contract is included in the operation thereof." The Home Indemnity Co. v. Village of Plymouth, 146 Ohio St. 96 (1945), paragraph two of the syllabus. However, it is well settled that "If the words and terms of the contract are plain and clear, there is neither room nor right for any court to attempt construction." First National Bank of Van Wert v. Houtzer, 96 Ohio St. 404, 406 and 407 (1917).

8. In Travelers Insurance Company v. Ohio Farmers Indemnity Company, 262 F. 2d 132 (6th Cir. 1958) the Sixth Circuit had before it a case strikingly similar to the instant one. The exclusion clause in that case was almost identical to the one in this action. The Court stated at page 133: "There is no ambiguity in the exclusion clause of defendant's policy and no inconsistency is shown between this and other clauses of the instrument. It does not require construction. All that is required is enforcement according to the terms clearly expressed in the instrument."

See also Kelly v. State Automobile Insurance Association, — F. 2d — (6th Cir. 1961) a very recent decision by the Sixth Circuit to the same effect. Compare the case of Travelers Insurance Company v. Peerless Insurance Company, 287 F. 2d 742 (9th Cir. 1961). Note that in the latter case the contention that the exclusion clause operated to eliminate any coverage was abandoned upon appeal.

9. The per curiam opinion in the case of Travelers Insurance Company v. Ohio Farmers Indemnity Company, supra, quotes Judge Parker, who, in a similar case stated: "There can be no question that the purpose was to apply the exclusion to employees of an additional insured as well as to those of the named assured. . . ." Lumber Mutual Casualty Insurance Company of New York v. Stukes, 164 F. 2d 571, 573 (4th Cir. 1947).

10. This Court has carefully examined the plaintiff's policy and concludes that there is no ambiguity in the exclusion clause of said policy and no inconsistency is shown between this and other clauses of the instrument. The exclusion of Candler from coverage under the American Fidelity Casualty Company, Inc. policy is clear.

11. Therefore, for the reason that this Court believes that the Ohio Supreme Court would agree with the Sixth Circuit and conclude that there is no ambiguity in the exclusion clause, and would therefore require the enforcement of the contract according to the terms clearly expressed in the instrument, it is hereby ORDERED, ADJUDGED and DECREED that plaintiff, American Fidelity and Casualty Company, Inc., be absolved of any liability or insurance coverage as to John W. Brummett and/or Farm Bureau Cooperative Association, Inc. and/or Indemnity Insufance Company of America.

In view of the Court's conclusion that there is no coverage under the policy to defendant, the question as to the timeliness of notice to plaintiff becomes moot.

.....

Judge U. S. District Court

APPENDIX F

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO ON MOTION FOR RELIEF UNDER RULE 60 (B)

This matter is before the Court on the motion of defendants for an Order pursuant to Rule 60 (b) of the

Federal Rules of Civil Procedure for relief from this Court's final judgment on the grounds of excusable neglect, and that it is no longer equitable that the judgment should have prospective application.

Counsel for defendants represent to the Court that they have discovered an unreported case, American Automobile Insurance Co. v. Motorists Mutual Insurance Co., Case No. 708,654, Court of Common Pleas of Cuyahoga County, (1960), which was affirmed without opinion by the Court of Appeals of Cuyahoga County. Counsel argue that since this case was affirmed by an Ohio Appellate Court it would have, if counsel had cited it, controlled the instant action and would have required a judgment contrary to the Court's ruling of June 2, 1961.

As this Court has previously stated, a federal district court is bound by the law as announced by a state's intermediate appellate court unless there is persuasive evidence that the highest state court would rule otherwise. However, in the case which counsel for defendants cite to this Court, the Appellate Court rendered no opinion; it affirmed without opinion. Therefore, there is no way to ascertain the reason for the affirmance; hence, it cannot be said that any law was announced by the Appellate Court's affirmance.

This Court has, however, carefully considered the case cited by counsel but is still of the opinion that if this question were presented to the Ohio Supreme Court it would agree with the reasoning of the Sixth Circuit as set forth in Travelers Insurance Company v. Ohio Farmers Indemnity Company, 262 F. 2d 132 (6th Cir. 1958).

Accordingly, the defendants' motion should be and it hereby is DENIED.

Judge U. S. District Court